Supreme Court of the United States

October Term 1960

No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

October Term 1960

No.

—o—

VICTOR PANICA,

Petitioner,

against

UNITED STATES OF AMERICA.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner respectfully asks this Court to issue a writ of certiorari to review the final judgment of the Court of Appeals for the Second Circuit which affirmed petitioner's conviction under 21 USC §§ 173 and 174 and for conspiracy to violate those sections.

The Opinion Below

The Court of Appeals opinion is not yet reported. A copy is hereto annexed, *infra*, pp. 13-15.

The Grounds of Jurisdiction

(i) The judgment sought to be reviewed was dated and entered on February 2, 1961.

(ii) No petition for rehearing was filed.

(iii) Jurisdiction of this Court is invoked under 28 USC § 1254(1).

Questions Presented for Review

1. Did the Court below err in refusing to direct a judgment of acquittal under Count 1?

2. Did the Court below err in refusing to direct a judgment of acquittal under Count 2?

3. Was there any basis in the record for the application of the presumption of 21 USC § 174?

Statutes Involved

Title 21

"§ 173. IMPORTATION OF NARCOTIC DRUGS PROHIBITED; EXCEPTIONS; CRUDE OPIUM FOR MANUFACTURE OF HEROIN; FORFEITURES. It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; that such amounts of crude opium and coca leaves as the board finds to be necessary to provide for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the board shall prescribe but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported. * * *

* * *

"§ 174. SAME; PENALTY; EVIDENCE.

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such

acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Statement of the Case

The indictment contains two counts. It is set out in the charge (R. 335, App. 9a*; R. 347, 348, App. 16a, 17a). The first states that petitioner, together with Altimari and Bonina, sold heroin (App. 9a); the second that these persons conspired to violate both Sections 173 and 174 (App. 16a, 17a). Altimari and Bonina pleaded guilty (R. 397, 402).

The only sale proved was made by Altimari and Bonina on February 4, 1959 to a government agent, Brown. There was no claim that petitioner had delivered the heroin or that he received the money paid. The principal claim of the government is that statements made by him three weeks later established that he had aided in furthering the earlier transaction. There was no proof whatever that the heroin had been illegally imported, or that petitioner knew that it had, the government relying entirely on the presumption of Section 174 (see R. 343, 344, App. 14a; R. 358, App. 23a).

At the close of the government's case and again at the close of the entire case petitioner's counsel moved for judgment of acquittal on the ground that there was no sufficient evidence of guilt and that since there was no proof either

* The references App. are to Appellant's Appendix in the Court below.

of illegal importation or of actual or constructive possession, the presumption could not operate (S.M. 191, 197, 270, 272, 273, 274). The Court left it to the jury to decide whether or not petitioner had aided Altimari to effect the transaction, since if he did, "then in the eyes of the law he had possession" (S.M. 345, App. 15a). After verdict a motion was made to set it aside (S.M. 377-381).

The record shows: A government agent, Brown, testified that after a conversation on February 4th with Altimari and Bonina (S.M. 35-37, Govt. App. 5a, 6a) he was told to be at the Throggs Neck Recreation Centre in the Bronx later that night (S.M. 37, Govt. App. 6a). When he arrived about 10 P. M. he saw petitioner standing in front of the Centre with the two other men (S.M. 40, Govt. App. 8a). Altimari requested Brown to go into the parking lot and Bonina and Altimari came over to the car, but Brown expressly stated that petitioner did not come with them (S.M. 41, Govt. App. 8a). Altimari went back to petitioner (S.M. 41, 123, Govt. App. 9a, 20a), but there is no evidence of what occurred between them. The heroin was delivered and the bulk of the money passed (S.M. 42, Govt. App. 9a). But there was no evidence that petitioner possessed the heroin or received any of the money (see S.M. 191, 194).

On February 19th Brown went back to the Centre. This time he was introduced to petitioner at the bar. Bonina and Altimari were standing; petitioner was sitting (S.M. 47, Govt. App. 10a). Altimari told Brown that petitioner was "with us" (S.M. 48, Govt. App. 10a)—but there is no indication that this was said in petitioner's hearing. Brown testified that he told Bonina in petitioner's presence, that he didn't know whether he was going to buy more stuff since the first quantity "didn't come up to par" (S.M. 48, Govt. App. 11a). Brown further testified that he paid Altimari the balance due on the first lot, $500, in the presence of petitioner (S.M. 50, 51, Govt. App. 12a). But again there was no evidence that petitioner received any of the money or even saw that it had passed.

On February 24th, Brown called the Centre bar, spoke with Altimari, and arranged to meet him at 91st Street and Broadway (S.M. 55). There he met Altimari and petitioner (S.M. 56). Brown testified (S.M. 59, 60, App. 2a, 3a) that petitioner asked him, "Well, what are you going to do this time?"; that he answered he wanted a quarter kilo, and that petitioner responded, "I don't think we can handle that little business this time." Then petitioner said they would give Brown good prices, specifying the range (S.M. 60, App. 3a), and that he would "personally guarantee that the stuff would be better than the stuff that I got the last time" (S.M. 62, App. 3a). Brown testified that he had told petitioner that Bonina had told him on the first occasion that the heroin could be "cut" at least seven times (S.M. 63) and that petitioner said he shouldn't worry about the quality (S.M. 66, App. 3a). Finally, Brown said that petitioner told him he would give him a telephone number in New Jersey—"it would be safer that way" (S.M. 67, App. 4a).

Later the same night Brown met the three men at a White Castle diner, also in the Bronx (S.M. 69, Govt. App. 17a). On that occasion Altimari leaned over petitioner, who was driving the car, to say they couldn't get the stuff because there were cops in the area (S.M. 70, Gvt. App. 18a). On Altimari's instructions Brown then went to a bar across the street and again met the three and Altimari repeated what had been said about cops (S.M. 71, Govt. App. 19a). Later in the evening Brown saw petitioner sitting in a car in front of a bar at 118th Street and Seventh Avenue (S.M. 72, App. 4a). Brown asked petitioner what he was going to do and petitioner waved him off (S.M. 73, App. 5a). Brown had no further contact with petitioner. The portions of the testimony involving these conversations with petitioner are contained in petitioner's Appendix in the Court below (pp. 2a-5a).

Other agents confirmed petitioner's presence at the various places indicated by Brown, but none of them had any conversation with him or overheard any of the con-

versations about which Brown had testified. The special agent who had been present at the bar on the 19th did not testify—his whereabouts at the time of the trial were apparently not known. The only other evidence involving petitioner was that of Gabriel Dukas who arrested him on February 28, 1960 while he was in an automobile with his brother and a small child (S.M. 178, 179, Govt. App. 25a). Dukas testified that petitioner first said that his name was Moscatel (S.M. 179, Govt. App. 26a) and lived somewhere on Long Island (S.M. 180, Govt. App. 27a), and that when the witness kept on calling him Panica, petitioner said it was not he (S.M. 181, Govt. App. 27a).

The Court of Appeals upheld the conviction on Count 1 on the ground that the evidence showed that petitioner was sufficiently connected with the sale of February 4th to permit the application of the presumption created by Section 174. The conspiracy charge was upheld in passing without any discussion of the separate problems relating thereto.

Reasons for Granting the Writ

The Court below has decided an important question of federal law which has not been, but should be, settled by this Court, to wit, the applicability of the presumption contained in 21 U. S. C. 174 to a person who was not shown to have had possession of the narcotics involved and its applicability to a conspiracy of which possession is not an element.

The Court below has decided a federal question in a way in conflict with applicable decisions of this Court, to wit, *Ingram* v. *United States*, 360 U. S. 672, and *Morrison* v. *California*, 291 U. S. 82.

1. It is clear that the government could obtain a conviction only by relying on the presumption contained in Sec-

tion 174. For there was no attempt to prove that the narcotics had been illegally imported or that petitioner knew they had. And, of course, that is an essential element of the crime.

Petitioner does not dispute the proposition advanced by the government and accepted by the courts below that constructive possession can bring the presumption into play. But he contends that such constructive possession may be relied on only when the evidence permits an inference of control; not where, as here, there is at most evidence of assistance. It is one thing to say that the presumption applies to a person instrumental in having the narcotics delivered, especially when he received the money. It is quite another to permit its operation where the evidence merely justifies an inference of willingness to participate in a new but not consummated sale. It is reasonable to infer that the master mind knows where the narcotics came from that his agents delivered at his behest. It is irrational to make such an inference merely because a person was willing to go along with others in an enterprise illegal under state law but which would not be illegal under federal law unless the material had been illegally imported.

The point here involved was considered at length by the Court below in *United States* v. *Santore*, not yet reported,* but under a set of facts much stronger for the government than here. For, as Judge Friendly there pointed out (slip opinion 2702), Santore "knew he was trafficking in a drug that 'comes off the boat' ". And, as Chief Judge Lumbard pointed out (*id.* 2693; see also 2694, note 4), he arranged the first meeting and collected and transmitted the money. No such participation in the sale exists in the case at bar. On the contrary, the situation of petitioner is much closer to that of Narducci and Tarlentino, whose convictions of the substantive offense were reversed in *Santore*, both by the

* Now before this Court on application of one of the defendants (No. 648).

original panel (see slip opinion of Oct. 2, 1959, pp. 269-270) and by the Court *en banc* (see slip opinion of Nov. 16, 1960, p. 2698).

The issue on which the members of that Court divided was whether the presumption was applicable to a mere aider and abetter. Chief Judge Lumbard, with the concurrence of Judges Moore and Smith, was of the opinion that 18 U. S. C. 2 must be read into 21 U. S. C. 174 so as to subject aiders and abetters to the presumption, while agreeing that one who merely "facilitates" is not so subjected. The other judges, Clark, Friendly, and Waterman, ruled that the presumption could apply only where there was dominion and control.

The case at bar was heard by a panel on which one representative of each position sat (Judges Clark and Moore) together with Judge Macomber from the First Circuit. That panel concluded that the conflict which existed in *Santore* did not exist here, because, they said, the jury could find that defendant was "an important and integral part of the narcotics operation" so that he had constructive possession. That conclusion rested in large part on an alleged failure "to disclaim responsibility" for the February 4th transaction when the agent, Brown, complained about the quality of the material then delivered (see App. 2a).

This, we submit, is a remarkable and wholly unwarranted inference. In the Court below the government sought to justify its argument to like effect on the authority of *Egan* v. *United States*, 137 F 2d 369 (8th Circ.). But in that case the failure to deny related to a statement implicating defendant at a formal conference called by the company of which he was an officer in the presence of its attorney to consider a charge of illegal conduct. It is a far cry from such a situation to the case at bar where a casual comment was made that was, indeed, ambiguous in its use of the pronoun "you," which did not necessarily

refer to petitioner since it was made in the presence of Altimari, who had delivered the narcotics.

Here we have a case where petitioner was not shown to have possessed the narcotics, to have directed their delivery, or to have received any of the money. At most the record shows a later knowledge of the earlier sale and a willingness to participate in a new one.

We believe the case to be like *Casella* v. *United States*, *D'Arta* v. *United States*, and *LoPiccolo* v. *United States* (Nos. 15-17) and *LoPiccolo* v. *United States* (No. 648), all pending on application for certiorari.

2. There is a further consideration which does not appear to have been discussed in any of the decided cases, namely, whether the presumption of Section 174 can apply to the charge of conspiracy here made. Possession by someone is, of course, an essential element of the substantive offense. The presumption is, therefore, properly applicable to the possessor and to others whose relation to the possessor is regarded as sufficient.

But it is not an essential element of a conspiracy charge, at least not of the charge here made. We submit, therefore, that there is nothing to which the presumption can attach in a conspiracy charge, where, as here, no overt act charges possession. For the conspiracy here charged could be established without proof that anyone involved in the conspiracy possessed narcotics.

All that is here charged (see Govt. App. 2a, 3a) is that there was an agreement to deal in illegally imported narcotics. As overt acts it is charged that petitioner was present on a certain date with two other men and that at a later date a payment was made to one of these other men (*id.* 3a). Such a charge could be established by proof that an agreement had been made for the delivery of narcotics, that the conspirators wanted to be paid in advance. Where or how they would get the narcotics with

which to carry out their agreement—assuming they would ever do so and not simply keep the money—is irrelevant to the charge. No possession of narcotics is, therefore, involved. How can the presumption be applicable to such a state of facts? And that is all that was involved in this indictment. These observations are particularly apt since the proof shows that no one of the three men had any narcotics in his possession on February 24th. For Altimari, in the presence of the other two (S.M. 69, Govt. App. 19a), told Brown "he didn't think they could get the stuff this time because there was a lot of cops in the area" (S.M. 70, Govt. App. 19a), but that they "would try again to get the stuff" (S.M. 70, Govt. App. 19a). Altimari told Brown to wait 20 minutes (S.M. 70, 71, Govt. App. 19a). But when all three returned Altimari again said "they couldn't get the stuff" (S.M. 71, Govt. App. 19a). Thus there was no possession to which the presumption could apply.

3. Finally, we believe that the principle of *Ingram* v. *United States*, 360 U. S. 672, governs this case. There several persons were convicted for conspiracy to evade payment of gambling taxes. Two of them were the owners of the enterprise, two were employees. The convictions of the former were affirmed, of the latter reversed. This Court noted that while the record supported a finding that the employees had been guilty of violation of state law, there was no basis for finding violation of federal law. Their mere participation in an illegal gambling enterprise could not support an inference that they knew a federal tax was due or intended to evade its payment. So here petitioner's participation in an illegal narcotics enterprise could not support an inference that he had knowledge that the narcotics had been imported and so that a violation of federal law involved. And absent facts permitting such an inference, the statutory presumption is mere legislative fiat and must fall as denial of due process. *Cf. Morrison* v. *California*, 291 U. S. 82.

Since the conviction for conspiracy cannot be upheld without a showing that petitioner had knowledge that the purpose of the conspiracy was to deal in illegally imported narcotics, the presumption really can play no meaningful part. For if there is proof *aliunde* the presumption of such knowledge, then there is no need for the application of the presumption. And if there is not, then how can a particular person's participation be established on the basis of someone else's possession? Is that not lifting by one's bootstraps? (See *Glasser* v. *United States*, 315 U. S. 60, 74.)

CONCLUSION

For all these reasons we respectfully ask that the application be granted.

Respectfully submitted,

OSMOND K. FRAENKEL,
Counsel for Petitioner.

APPENDIX

Opinion of United States Court of Appeals, for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 256—October Term, 1960.

(Argued January 13, 1961 Decided February 2, 1961.)

Docket No. 26689

UNITED STATES OF AMERICA,

Appellee,

v.

VICTOR PANICA,

Defendant-Appellant.

Before:

CLARK, MAGRUDER and MOORE,

Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Edward Weinfeld, *Judge*.

Defendant Victor Panica appeals from his conviction on both counts of a two-count indictment charging violation of 21 U. S. C. §§ 173, 174, and conspiracy to violate those sections. Judgment affirmed.

OSMOND K. FRAENKEL, New York City, for appellant.

DANIEL P. HOLLMAN, Asst. U. S. Atty., S. D. N. Y., New York City (S. HAZARD GILLESPIE, JR., U. S. Atty., and ROBERT B. FISKE, JR., Asst. U. S. Atty., New York City, on the brief), for appellee.

per curiam:

Defendant Victor Panica appeals from his conviction of participating in the sale of heroin in violation of 21 U. S. C. §§ 173, 174, and of conspiring to violate those sections, following a jury trial before Judge Weinfeld. We find that sufficient evidence exists to support the conviction, and that the presumption of knowledge of illegal importation which 21 U. S. C. § 174 attaches to unexplained possession of the drug was properly applied to defendant.

There was testimony that Agent Brown of the Federal Bureau of Narcotics met defendant's coconspirators Bonina and Altimari on February 4, 1959, and made arrangements for the purchase of heroin, to be delivered at Throggs Neck Recreation Center at 10 p. m. that day. When Brown drove up to the Center in his car, he saw Altimari and Bonina together with defendant standing in front of the Center. Altimari and Bonina came over to Brown's car, leaving defendant in front of the Center. Altimari then rejoined defendant momentarily, and immediately returned to the car with a bag containing heroin, which he delivered to Brown. Brown made final payment for the heroin to Altimari on February 19, 1959, and discussed future purchases in the presence of Bonina and defendant. At a subsequent meeting on February 24, 1959, defendant made statements to Brown indicating that he was a participant in the sale of February 4, 1959. When Brown sought to purchase a quarter kilo, the same quantity delivered on February 4, 1959, defendant replied: "I don't think we can handle that little business this time. You have got to get a half kilo or better." At the same time defendant failed to disclaim responsibility for the allegedly inferior quality of "the stuff that I [Brown] got from you [defendant] the last time."

The above evidence is sufficient to support the conviction for participating in a sale and for conspiring to violate

21 U. S. C. §§ 173, 174, provided that defendant had sufficient dominion and control over the heroin to make applicable the presumption of knowledge of illegal importation which 21 U. S. C. § 174 attaches to possession, actual or constructive. The evidence recited above shows that defendant was an important and integral part of the narcotic operation, and not a mere casual aider and abettor. In these circumstances a jury was entitled to find that he had sufficient dominion and control over the narcotics handled by the conspiracy, including those sold on February 4, 1959, to have constructive possession. The charge to the jury, while somewhat ambiguous, sufficiently stated that he must be found to have "dominion and control" before he could be charged with possession within the purview of the statute. Accordingly we conclude that the jury properly found defendant to have had the requisite possession; and the conviction is affirmed, without consideration of the issues which divided this court sitting *in banc* in *United States v. Santore*, 2 Cir., — F. 2d —.

Affirmed.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of February, one thousand nine hundred and sixty-one.

Present:

HON. CHARLES E. CLARK,
HON. CALVERT MAGRUDER,
HON. LEONARD P. MOORE,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

VICTOR PANICA,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.